

TRANSPORTATION REPORT

From: Terry Whiteside

To: Montana Wheat & Barley Committee

Date: January 20, 2011



CHAIRMAN JOHN (JAY) ROCKEFELLER ANNOUNCED HIS PRIORITIES AND GOAL FOR THE U.S. SENATE COMMERCE COMMITTEE FOR THE 112TH CONGRESS (Captive Shipper legislation highlighted in Yellow)

On January 20th, Chairman Rockefeller stated: "I look forward to working with my colleagues to tackle issues that are critical to America's future," Rockefeller said. "In the new Congress, I will continue my fight to bring modern day protections for consumers and accountability to fraudsters, promote high-tech job creation and competitiveness, and keep Americans safe, secure, and on the move. I intend to not only complete a number of top priorities that I began in the 111th Congress, but also take on a number of new challenges Americans are facing every day."

Key Priorities for the U.S. Senate Committee On Commerce, Science, and Transportation in the 112th Congress Include:

A FOCUS ON JOBS, ECONOMIC SECURITY AND GROWTH

- Building out America's manufacturing sector and promoting exports
- Bolstering our infrastructure through
- Improving transportation in the highway, rail, pipeline, and maritime sectors
- Making necessary investments in our nation's aviation infrastructure and air service development, and
- Broadband deployment and Universal Service Fund reform
- **Alleviating the financial pinch felt by railroad shippers nationwide**

- Strengthening our commitment to Science, Technology, Engineering, and Mathematics (STEM) education through the America COMPETES Act
- Implementing the NASA Authorization Act of 2010
- Protecting coastal economies, jobs, and our nation's valuable energy resources through continued oversight of the Gulf spill recovery efforts and long term restoration

A PROACTIVE APPROACH TO AMERICA'S HOMELAND SECURITY

- Enacting comprehensive cyber security legislation
- Ensuring the necessary public safety communications resources for our nation's first responders
- Reinforcing constructive advancements to Transportation Security Administration screening and improving security in all modes of transportation
- Improving security of our cargo and general aviation traffic
- Securing our ports and the transportation of chemicals
- Increasing the Coast Guard's response capabilities
- Keeping Americans safe by improving the National Oceanic and Atmospheric Administration's weather forecasting and disaster preparedness
- Protecting the federal government's investments in biometrics

21st CENTURY CONSUMER PROTECTION & SAFETY

- Continuing oversight of important federal agencies, such as the Federal Trade Commission, the Consumer Product Safety Commission, the Surface Transportation Board, and the Federal Communications Commission
- Protecting consumer information and privacy on the Internet
- Cracking down on consumer fraud, including online billing scams
- Furthering efforts to make our nation's highways safer and eliminate distracted driving
- Increasing motor vehicle and truck safety by passing National Highway Traffic Safety Administration and Federal Motor Carrier Safety Administration Reauthorizations
- Granting victims injured or killed offshore—such as the victims and families of the Deepwater Horizon tragedy—parity with those injured or killed onshore
- Boosting the accuracy and effectiveness of forensic science by employing the National Institute of Standards and Technology and National Science Foundation scientific and standards expertise

Senate Commerce Committee Releases Report on S2889 - The STB Reauthorization and Captive Shipper Bill from the 111th Congress

Background: The Senate Commerce Committee on December 21, 2010 released its long awaited report on S2889 - the bill addressing STB reauthorization and captive shipper

needs - pushed by Chairman Rockefeller and passed out of the full Committee with a unanimous vote on December 17, 2009.

The report, dated December 21, 2010, is quite lengthy (133 pages) so this TR will summarize the results - but in the Report it is quite amazing the number of times the problems of agricultural producers that is specifically addressed in the bill. It shows that the work of the Alliance for Rail Competition and the Rail Customer Coalition was very influential in the draft of the provisions inserted in this bill. The drafting of this bill required untold hours of work by the Rail Customer Coalition and the Alliance for Rail Competition over about 13 months.

History: In the 30 years since the Staggers Act was enacted, the industry has evolved and the railroads' financial viability has improved. There have been numerous acquisitions and consolidations amongst the larger railroads and a proliferation of short line railroads. There are currently seven Class I railroads 1 (BNSF Railway Company, Canadian National Railway Company (Grand Trunk Corporation), Canadian Pacific (Soo Line Railroad Company), CSX Transportation Inc., Kansas City Southern Railway Company, Norfolk Southern Corporation, and Union Pacific Railroad) and approximately 550 Class II and Class III railroads. The industry has also increased its productivity, which was flat prior to the Staggers Act, but was up 172 percent from 1981 to 2009. As a result of the mergers and increased productivity, the number of Class I employees decreased from over 458,000 in 1980 to over 164,000 in 2008 and the number of road-miles decreased from 164,822 in 1980 to 94,209 in 2008. The average Class I railroads return on investment increased from 1978 when it was 1.52 percent to 10.7 percent in 2008. Since the 1980s, the Class I proportion of total industry freight revenue has remained relatively constant in the mid-90 percent range versus single digit percentage of total revenues for Class II and Class III railroads.

For the majority of this same time period (1980-2000), railroad rates charged to most shippers largely declined; however, rates began to rise in 2001 with significant increases in recent years, particularly in 2008. According to the Christensen Associates report discussed in greater detail below, in the two-year period between 2007 and 2008, real revenue per ton-mile for the industry increased by about 12 percent. However, certain industries—coal and chemicals in particular— experienced above average

increases. Additionally, railroads have also begun to shift costs to some shippers, including costs for fuel surcharges, car ownership, and liability costs. Furthermore, captive shippers have increasingly complained about the lack of competitive access and poor service from railroads. The U.S. freight railroad industry remains important to the success of the nation's economy and global competitiveness because the railroads play a key role in overall U.S. freight shipments, with some commodities particularly dependent on rail transportation. For example, 70 percent of domestically-produced automobiles, 70 percent of coal delivered to power plants, and about 35 percent of the U.S. grain harvest move by rail. Since 1980, railroads have captured an increasing share of U.S. freight shipments. Railroads accounted for about 27 percent of the ton-miles of U.S. freight movements in 1980, and that number increased to 42.7 percent in 2007. Because of the reliance of certain shippers on the freight rail industry and the overall importance of the rail industry to the U.S. economy, policy changes affecting oversight of the railroad industry are essential to ensure a proper balance between the needs of the railroads and the users of their systems.

Congressional interest in ensuring the appropriate balancing of railroad and shipper interests, and the continued viability and ability of the railroad industry to fulfill demands for its services, has led the U.S. Government Accountability Office (GAO) to issue several reports on the railroad industry since the passage of the Staggers Act. In 2006, the GAO reported that while rates have declined since 1985, they have not done so uniformly, and rates for some commodities are significantly higher than rates for others. It also found that the railroads have shifted other costs, such as fuel surcharges, to shippers, and the STB has not collected sufficient data to accurately monitor the revenues the railroads have raised from some of these charges.

The GAO concluded that its findings may reflect reasonable economic practices by the railroads in an environment of excess demand, or a possible abuse of market power¹. In 2008, Christensen Associates released its report and issued subsequent revisions in

¹ GAO, "Freight Railroads: Industry Health Has Improved, but Concerns about Competition and Capacity Should Be Addressed," (GAO-07-94) 2006.

November 2009 and January 2010². The report found that weak reporting and data collection by the Board prevented a stronger analysis of ongoing shipper concerns, such as effective competition, service quality, shifting of costs from railroads to shippers, captivity and network access, capacity and demand, and fuel surcharge issues. The report makes recommendations about policy changes that would have a positive impact by increasing competition. The report advocates that the current structure and performance of the railroad industry would favor reciprocal switching and terminal access agreements with STB oversight. It also advocates the increased use of arbitration to improve the functioning of private markets, as long as the arbitrators are conversant in the complexities of railroads economics.

S2889 Commerce Committee Report Recommendations

The report makes recommendations about policy changes that would have a positive impact by increasing competition.

1. The report advocates that the current structure and performance of the railroad industry would favor reciprocal switching and terminal access agreements with STB oversight.
2. It also advocates the increased use of arbitration to improve the functioning of private markets, as long as the arbitrators are conversant in the complexities of railroads economics.
3. S. 2889 would formally establish the Board as an independent agency by removing it from its administrative affiliation with the DOT.
4. The STB Act would also increase Board membership from three to five members to make it consistent with other independent Federal agencies and boards. It would also update the member qualification requirements to provide that at least 3 Board members have professional standing and demonstrated knowledge in the fields of transportation, transportation regulation, or economic regulation, and at

² Christensen Associates, "A Study of Competition in the U.S. Freight Railroad Industry and Analysis of Proposals that Might Enhance Competition," November 2008. The STB asked that Christensen revise the reports to make corrections to the initial report using corrected masked versus unmasked customer waybill sample data and updated data from 2007 and 2008.

least 2 members have professional or business experience (including agriculture and other rail customers) in the private sector.

5. The STB Act would also limit the amount a party must pay for filing a formal complaint. The filing fee would not be higher than the fee to file a civil action in a district court in the United States, which is currently \$350.
6. Would establish a Rail Customer Advocate as a resource for rail customers and allow rail customers to have continued access to Board's Office of Public Assistance, Governmental Affairs, and Compliance (OPAGAC).
7. S. 2889 would authorize the Board to begin an investigation on its own initiative, an authority that was previously vested in the ICC.
8. S. 2889 would update the current rail transportation policy (RTP) making rail competition a prime directive in action taken by the Board.
9. S. 2889 would direct the Board to undertake a number of studies to address concerns raised by industry stakeholders, including needed updates to the uniform rail costing system (URCS), the use of replacement costs in Board proceedings, the use of certain rail practices, the effect of rail car interchange rules and their effect on the national rail system, and guidance on how to apply the revenue adequacy constraint. Until the Board updates URCS, S. 2889 would permit parties to make reasonable movement-specific adjustments to the variable costs calculated by URCS in full SAC cases.
10. S. 2889 would codify the STB's current standards for the review of interchange agreements/paper barriers. There is concern that some of these agreements have impeded competition by prohibiting short line or regional railroads from interchanging traffic with other railroads, thereby prejudicing shippers.
11. S. 2889 would overturn the mid-1980s *Midtec Paper* decisions, which govern mandated reciprocal switching and terminal access (which refer to activities where one railroad operates on the facilities of another railroad).
12. The STB Act would require a Class I rail carrier, or other rail carrier the Board determines appropriate, to quote a bottleneck rate to a shipper over which they

have market dominance. This provision would also require the Board to establish and maintain standards for determining whether a bottleneck rate is reasonable.

13. Although the STB Act makes no changes to 49 U.S.C. 10707 to address specifically the concerns raised, the Committee encourages the Board to use sufficient scrutiny to ensure that rail carriers are effectively competing with one another.
14. The Committee recognizes the long-standing concerns of shippers, such as **agricultural producers**, about the economic and other challenges of bringing complaints before the Board. As part of the Committee's efforts to address ongoing small shipper concerns, S. 2889 would allow the Board to direct certain rail rate, practice, and common carrier service expectation disputes to be resolved by an arbitrator. S. 2889 would make this process more accessible by allowing a shipper to request that the Board direct a dispute to binding arbitration, either upon complaint or following informal mediation.
15. S. 2889 would amend the STB's simplified rate case processes to increase the value of what may be awarded under the Three Benchmark and SSAC methods to \$1.5 million and \$10 million, respectively.
16. S. 2889 would make several improvements to the Board's ability to monitor and resolve service concerns.

It is important that the Commerce Committee issued this report before the 112th Congress convenes as it establishes Senate legislative history as we enter the new Congress.

STB New Vice Chairman is Chuck Nottingham

Surface Transportation Board Chairman Daniel R. Elliott III announced that Board Member Charles D. Nottingham has been designated as the agency's Vice Chairman. He succeeds Francis P. Mulvey, who most recently served as Vice Chairman from January 5, 2010 to January 4, 2011, and who continues to serve as a Board Member.

This does not suggest a policy change as the Board's Vice Chairmanship rotates between the Members on an annual basis.

Ann Begeman Is Nominated By the President To Be The New STB Board Member Succeeding Chuck Nottingham

Excerpted from the Platts Coal Outlook January 3, 2011

Ann Begeman has built a reputation as a go-to person on transportation issues during nearly two decades she has spent working as an aide on Capitol Hill.

Former colleagues say that Begeman, who spent the majority of her career working on transportation issues for the Senate Commerce, Science and Transportation Committee, has accumulated an impressive breadth of knowledge spanning modes ranging from ocean carriers to trucks and railroads.

A native of Humbolt, South Dakota, Begeman attended the University of South Dakota where she majored in business administration. She worked as a senior benefits analyst at American Bankshare until 1992 before coming to the Senate.

She started as an aide to South Dakota Senator Larry Pressler, a Republican, then moved to the Commerce Committee in 1995, a post where she has stayed except for a five-year stint as legislative director for Senator John McCain of Arizona. She came back to the committee as staff director in 2009.

During that time she helped author the legislation that disbanded the Interstate Commerce Commission, leading to the creation of the Surface Transportation Board in 1996. In recent years, she has been the point person for Republicans in developing bipartisan legislation to revamp and further empower the board.

Begeman declined interview requests, citing her upcoming confirmation hearing before the Commerce Committee, where leaders from both parties promised quick confirmation in recent statements. If confirmed, she would join Chairman Dan Elliott and Vice Chairman, both Democrats, on the board.